STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

AMCOR FLEXIBLES, INC.,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. 11-0033
	:	
COMMONWEALTH EDISON COMPANY,	:	
	:	
Respondent.	:	
	:	
Complaint pursuant to Sections 9-250 and 10-108 of the Illinois Public Utilities Act (220 ILCS 5/9-250 and 220 ILCS 5/10-108) and Section 200.170 of the Rules of Practice (83 Ill. Adm. Code 200.170).	:	

BRIEF ON EXCEPTIONS

OF

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ORAL ARGUMENT REQUESTED

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Amcor Flexibles, Inc. ("Amcor"), for its Brief on Exceptions to the Proposed Order on Remand of the Administrative Law Judge (the "ALJ") made on July 23, 2015 pursuant to Section 200.830 of the Rules of Practice of the Illinois Commerce Commission (the "Commission"), states as follows:

I. INTRODUCTION AND SUMMARY OF POSITIONS

In this case, Commonwealth Edison Company ("ComEd") asserts that one of its meters (the "Replaced Meter")[1] under-billed Amcor and that ComEd is entitled to back-charge Amcor $62,190.07. Amcor filed a Formal Complaint on January 11, 2011, disputing (among other things) that ComEd was permitted to make this back-charge.

[1] Capitalized terms used herein without definition have the meanings given in the Stipulation referred to below.

First, ComEd removed the Replaced Meter from service in April 2009 and claims to have subsequently tested it. However, while the parties were in the middle of their dispute, ComEd threw the Replaced Meter away before Amcor could test it to verify that ComEd's testing was proper and accurate. This was a blatant violation of ComEd's well-established duty under Illinois law to preserve evidence. Amcor therefore filed a Motion in Limine to prohibit ComEd from presenting evidence that the Replaced Meter was under-billing Amcor. The ALJ improperly denied Amcor's Motion in Limine. Had the Motion in Limine been granted, ComEd would not have any evidence that the Replaced Meter under-billed, nor any evidence as to why it under-billed. Moreover, this wound to ComEd's case is self-inflicted. ComEd never tried to develop any other evidence to support its position despite knowing, at the time it signed the Stipulation, that Amcor planned to file the Motion in Limine.

The Administrative Law Judge (the "ALJ") initially denied Amcor's Motion in Limine on July 31, 2012. On April 2, 2014, the Commission entered an order (the "Commission Order") addressing the merits of the parties' positions but never mentioning the Motion in Limine or the impact that granting that motion would have on the proceeding. On appeal, the Appellate Court of the State of Illinois, First District, reversed the Commission's April 2, 2014 Order, holding:

> The Commission erroneously failed to consider the merits of Amcor's motion *in limine*….The Commission's order is reversed and the cause remanded for further proceedings in which the Commission is to address the substantive merits of Amcor's exceptions to the ALJ's ruling on the motion *in limine*.

Amcor Flexibles, Inc. v. Illinois Commerce Commission, et al., No. 1-14-1964 (January 29, 2015) ("Appellate Opinion"), pp. 21-22. On July 23, 2015, the ALJ issued a Proposed Order that denies Amcor's Motion in Limine. For the reasons stated herein, that recommendation is erroneous and the Commission should grant the motion and prohibit ComEd from submitting any evidence (including but not limited to Paragraph 36 of the Stipulation) that the Replaced Meter under-billed Amcor. As a result, Amcor should prevail on its Formal Complaint and the Commission should prohibit ComEd from back-billing Amcor.

The Appellate Opinion did not consider the other aspects of Amcor's appeal of the Commission

Order ("In light of this holding, Amcor's remaining arguments on appeal are premature.") Appellate Opinion, p. 22). Therefore, the Commission is free to reverse its Order of April 2, 2014 and rule that, even if the Commission denies Amcor's Motion in Limine and permits evidence that the Replaced Meter under-billed, ComEd still cannot back-charge Amcor under the Commission's Regulations. In particular, ComEd flouted the Commission's regulations regarding meter testing. ComEd did not perform the post-installation testing required by Regulation 410.155,[2] and the pre-installation testing ComEd conducted, supposedly to determine if the Replaced Meter was accurate in compliance with Regulation 410.160, did not bother to test whether the Replaced Meter was reporting accurate usage information. Regulation 410.200(h)(1) prohibits utilities from making billing adjustments if the testing and accuracy requirements of Part 410 of the Commission's regulations have not been met. The Proposed Order completely ignores ComEd's failure to comply with the Commission's meter testing requirements, and incorrectly holds that Regulation 410.200(h)(1) does not apply.

In addition, the parties agreed that the Stipulation of Facts and Undisputed Testimony (the "Stipulation") filed in this Docket on December 22, 2011, a copy of which is attached as Attachment A to this Brief on Exceptions, is the entire evidentiary record in this proceeding. (Attachment A, Stipulation, page 1). The Stipulation contains two sections: a "Stipulation of Facts" that contains agreed facts, and another section captioned "Undisputed Testimony" that contains facts Amcor could not dispute because ComEd threw away the Replaced Meter.[3] (Attachment A, Stipulation, page 9). Amcor also takes exception to several portions of the Proposed Order that reference "facts" that are not part of the Stipulation.

Regulation 410.200(h)(1) is clear: If a utility fails to meet all of the testing and accuracy requirements of Part 410, the consequence is that it may not adjust the customer's billing. ComEd failed to

[2] 83 Ill. Adm. Code Section 410.155. Part 410 of the Commission's regulations are herein referred to collectively as the "Regulations," and individually as a "Regulation."

[3] The Stipulation expressly recognizes that Amcor would file a Motion in Limine to exclude all or some of the Undisputed Testimony from evidence. (Attachment A, Stipulation, page 9, fn. 3).

meet those testing and accuracy requirements in this case. Were the Commission to adopt the Proposed Order as filed and hold in favor of ComEd, such an order would signify that that it doesn't matter whether a utility obeys the Commission's regulations and that there are no consequences for its non-compliance.

II. EXCEPTIONS

A. Exception No. 1: The Proposed Order Omits Parts of Amcor's Arguments

Rule of Practice 420. On page 3, in summarizing Amcor's position, the Proposed Order references Amcor's argument that, under long-established case law involving multiple opinions, Illinois courts have repeatedly sanctioned litigants under Ill. S. Ct. Rule 219(c) for destroying evidence. *See*, for example, Motion in Limine, pp. 4-6. Ill. S. Ct. Rule 219(c) addresses sanctions for discovery violations and violations of court orders. The Proposed Order, however, fails to mention that the Commission's Rules of Practice contain a provision that is almost identical to this rule. *See*, for example, Motion in Limine, pp. 5-6. Rule of Practice 420 (83 Ill. Adm. Code 200.420) provides in pertinent part:

> If a person fails to comply with…a discovery order,…if the person who fails to comply is a party to the proceeding…the Hearing Officer may strike all or any part of the pleadings of such party, or refuse to allow the party to support designated claims or defenses, or take such further action as may be appropriate under the circumstances and as provided by law.

The Proposed Order should reflect that the Commission has a specific provision of its own Rules of Practice, nearly identical to the Illinois Supreme Court Rule at issue in the case law, that authorizes it to grant the Motion in Limine and bar ComEd's testimony, and that Amcor noted that provision in its arguments.

Merits. Because the Appellate Court did not rule on the other aspects of Amcor's appeal, other than reversing the denial of the Motion in Limine without explanation, the other arguments Amcor made regarding the merits should be incorporated into the Proposed Order. The Commission can still modify its Order and rule that Regulation 410.200(h)(1) bars ComEd from back-charging Amcor because ComEd did not perform all of the testing required under Part 410 of the Commission's Regulations.

B. Exception No. 2: The Commission Should Grant Amcor's Motion in Limine.

In its Exceptions, Amcor has added a section to the "Commission's Analysis and Conclusions"

which grants Amcor's Motion in Limine and provides the supporting analysis. As described below, the Motion in Limine should have been granted because (a) ComEd had a duty to preserve the Replaced Meter, (b) ComEd breached that duty by disposing of the Replaced Meter one day after the Commission closed the Informal Complaint because it could not resolve the parties' dispute, and (c) the only way to level the playing field and remedy the prejudice Amcor suffered as a result of ComEd's breach of duty is to prohibit ComEd from presenting evidence or argument regarding its post-service testing and the results thereof.

1. ComEd Had a Duty to Preserve the Replaced Meter

Fourteen years ago, the Illinois Supreme Court made it clear that potential litigants have a duty to take reasonable measures to preserve the integrity of relevant and material evidence before litigation is filed. *Shimanovsky v. General Motors Corporation*, 181 Ill.2d 112, 121-22, 692 N.E.2d 286, 290 (1998). In *Shimanovsky*, the Court upheld the trial court's decision to sanction the plaintiff under Illinois Supreme Court Rule 219(c) for destructive testing of an allegedly defective part that caused a car accident, even though the testing occurred before the litigation was commenced. The Court noted that Rule 219(c) authorizes sanctions only for unreasonable failure to comply with a court order, but held that the Rule nevertheless authorizes a court to impose sanctions for pre-litigation conduct:

> Thus, the appellate court has determined that a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence. This duty is based on the court's concern that, were it unable to sanction a party for the presuit destruction of evidence, a potential litigant could circumvent discovery rules or escape liability simply by destroying the proof prior to the filing of a complaint. [citations omitted] We agree with the appellate court that a potential litigant does indeed owe such a duty.

Id. The *Shimanovsky* Court held that the plaintiff's pre-litigation destructive testing violated its duty to preserve evidence:

> The rules provide that both parties are entitled to full disclosure by discovery of any relevant matter, including matters which relate to the defense of a party. 166 Ill.2d R. 201(b)(1); *Yuretich v. Sole*, 259 Ill. App. 3d 311, 317, 197 Ill. Dec. 545, 631 N.E.2d 767 (1994). Moreover, either party may seek production of evidence for testing whenever the condition of such item is relevant. 166 Ill.2d R. 214. Thus, defendant had a right to perform tests on the power-steering components in order to formulate its defense to the

> products liability action. However, plaintiffs' destructive testing interfered with defendant's right to such discovery. Under the specific circumstances of this case, we cannot say that the trial court abused its discretion in determining that plaintiff's actions were an unreasonable noncompliance with discovery rules.

181 Ill.2d at 122-23, 692 N.E.2d at 290. *See also*, *Kambylis v. Ford Motor Company*, 338 Ill. App. 3d 788, 793-94, 788 N.E.2d 1, 5 (1st Dist. 2003) (duty to preserve allegedly defective automobile before litigation); *American Family Insurance Company v. Village Pontiac-GC, Inc.*, 223 Ill. App. 3d 624, 626-27, 585 N.E.2d 1115, 1118 (2nd Dist. 1992) (duty to preserve automobile that allegedly caused fire, even if no preservation order has been entered); *Graves v. Daley*, 172 Ill. App. 3d 35, 38, 526 N.E.2d 679, 681 (3rd Dist. 1988) (duty to preserve allegedly defective furnace after fire but before litigation); *American Family Insurance v. Black & Decker*, 2003 WL 22139788, at 2, CCH Prod. Liab. Rep. ¶ 16,748 (N.D. Ill. 2003) (duty under Illinois law to preserve fire scene before litigation); *Lawrence v. Harley-Davidson Motor Company, Inc.*, 1999 WL 637172, at 2 (N.D. Ill. 1999) (disassembly of allegedly defective motorcycle before filing suit violated Illinois state law duty to preserve evidence).

The policy concerns raised in these precedents are identical to those confronting the Commission in this Docket: a potential litigant should not be able to circumvent discovery rules or escape liability simply by destroying the evidence prior to the filing of a formal complaint. Based on its inherent power to regulate the dispute process, and in light of *Shimanovsky* and the other cases cited above, this tribunal can and should sanction ComEd for throwing away the meter just before the filing of the formal complaint in this dispute. The Commission's own Rules of Practice follow the Illinois rules of evidence: "In contested cases…the rules of evidence and privilege applied in civil cases in the circuit courts of the State of Illinois shall be followed." 83 Ill. Adm. Code Section 200.610(b). Further, the Commission's Practice Rules are nearly identical to the Illinois Supreme Court Rules governing discovery. For example, Commission Rule 420 (83 Ill. Adm. Code Section 200.420) tracks Ill. S. Ct. Rule 219(c) and provides in pertinent part:

> If a person fails to comply with…a discovery order…or if the person who fails to comply is a party to the proceeding,…the Hearing Examiner may…refuse to allow the party to

> support designated claims or defenses, or take such further action as may be appropriate under the circumstances and as provided by law.

Ill. S. Ct. Rule 219(c) provides in pertinent part: "If a party…fails to comply with any order entered under these rules, the court, on motion, may enter…such orders as are just, including, among others, the following:…(iii) That the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint or defense relating to that issue; (iv) That a witness be barred from testifying concerning that issue…." Further, the Commission's Practice Rules also provide for written discovery, including the inspection of property, comparable to that available under the Illinois Supreme Court Rules. Rule 340 (83 Ill. Adm. Code 200.340) provides that "It is the policy of the Commission to obtain full disclosure of all relevant and material facts to a proceeding." *Cf.* Ill. S. Ct. Rule 201(b)(1), cited in *Shimanovsky* (*see* above). Further, Rule 360(c) (83 Ill. Adm. Code 200.360(c)) provides:

> ...[A]ny party may utilize written interrogatories to other parties, requests for discovery or inspection of documents or property and other discovery tools commonly utilized in civil actions in the Circuit Courts of the State of Illinois in the manner contemplated by the Code of Civil Procedure [735 ILCS 5] and the Rules of the Supreme Court of Illinois [S. Ct. Rules].

In addition, Commonwealth Edison knew or reasonably should have known that further litigation was at least likely, if not obviously imminent. Amcor had refused to pay ComEd's Back-Charge Claim and had been disputing it continuously since December 2009 (Attachment A, Stipulation, ¶ 19 and Exhibits C, D, E, F and G). The parties had engaged in settlement discussions, which failed. ComEd had threatened to shut off the electricity at Amcor's Mundelein Plant, and Amcor had responded by filing an Informal Complaint with the Commission. (Attachment A, Stipulation, ¶¶ 19 and 20). The Commission closed the Informal Complaint precisely because it was unable to resolve the parties' dispute (Attachment A, Stipulation, ¶¶4 and 20), so the dispute was patently very much alive at that point. Then, on the very next day after the Commission closed the Informal Complaint, ComEd threw away the Replaced Meter. (Attachment A, Stipulation, ¶¶ 20 and 37). Indeed, ComEd did not threaten to shut off Amcor's power after

the Informal Complaint was closed, which was the obvious next step if ComEd, sitting on a bill it considered long past due, thought no further legal proceedings would occur. The next step for Amcor was even more obvious, to file a formal complaint, which it did.

2. The Commission Should Deny ComEd the Right to Use the Type of Evidence It Prevented Amcor from Obtaining.

Both Illinois law and basic principles of fairness provide that because ComEd's actions prevented Amcor from testing the Replaced Meter, ComEd should not be able to use its own tests of the Replaced Meter. "As a matter of sound public policy, an expert should not be permitted intentionally or negligently to destroy such evidence and then substitute his or her own description of it." *Village Pontiac*, 223 Ill. App. 3d at 627-28, 585 N.E.2d at 1118-19. *See also*, *Kambylis*, 338 Ill. App. 3d at 798; 788 N.E.2d at 8 (holding that access to photographs and some parts of defective product were inadequate where "the most important evidence"—the product itself—is unavailable.); *Lawrence*, 1999 WL 637172 at 2 (videotape of disassembly of motorcycle was not a substitute for allowing a party to conduct its own inspection of the motorcycle). ComEd's destruction of the key evidence in this case deprived Amcor of the ability to conduct any tests of the Replaced Meter. ComEd has thus made it impossible for Amcor to respond to ComEd's claims that the Replaced Meter under-billed, or that ComEd had programmed the wrong scaling factor into it.

Only one action can negate the prejudice that ComEd has inflicted on Amcor: prohibit ComEd from presenting claims and evidence that, because of ComEd's actions, Amcor cannot rebut—namely, the claims that the meter under-billed and had an improper scaling factor, as well as ComEd's alleged testing results.

Under Illinois law, a tribunal looks to the following factors in determining the appropriate sanction:

> (1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony.

Shimanovsky, 181 Ill.2d at 124, 692 N.E.2d at 291. These factors, which incorporate basic fairness into

the analysis, militate against admission of ComEd's test evidence and its assertions that the Replaced Meter under-billed.

First, Amcor was unfairly surprised because ComEd did not notify Amcor that it was going to dispose of the Replaced Meter. *See Kambylis*, 338 Ill. App. 3d at 796-97, 788 N.E.2d at 7-8 (noting that a party even has a duty to inform an opponent that evidence outside of its control is about to be destroyed).

Second, Amcor has suffered severe prejudice because the Replaced Meter is irretrievably lost and Amcor has no ability to test it; ComEd's actions prohibited Amcor from disputing ComEd's claims about the meter. *See Kambylis*, 338 Ill. App. 3d at 795, 788 N.E.2d at 6 (barring evidence related to allegedly defective automobile where automobile was destroyed because "the destruction of the evidence greatly prejudiced the defendant such that it prohibited it from effectively defending against plaintiff's claims"); *Village Pontiac*, 223 Ill. App. 3d at 628, 585 N.E.2d at 1118-19 ("Under these particular circumstances, the existence of the two wires and the photographs is not a substitute for the car, the object on which plaintiffs based the complaint."); *Lawrence*, 1999 WL 637172, at 3 (defendant could not properly defend itself absent inspection of the motorcycle's condition at time of accident).

Third, the evidence ComEd destroyed is the central piece of evidence in this case, analogous to the allegedly defective product in a products liability case. *Kambylis*, 338 Ill. App. 3d at 793, 788 N.E.2d at 5 ("Illinois courts have long held that '[t]he preservation of an allegedly defective product is of the utmost importance in both proving and defending a strict liability claim.'"); *Graves*, 172 Ill. App. 3d at 38, 526 N.E.2d at 681; *Village Pontiac*, 223 Ill. App. 3d at 627, 585 N.E.2d at 1118 (describing the car that allegedly started the fire as "the most crucial piece of evidence in this case"). Further, Amcor has been diligent in raising this issue and objecting to the proffered testimony.

3. The Evidence Indicates That ComEd Did Not Act in Good Faith

Finally, there is evidence that ComEd did not act in good faith. To begin with, the Replaced Meter was obviously the most critical evidence in this dispute. *See, e.g., Village Pontiac*, above. Common sense

dictates that the Replaced Meter should be retained until the dispute is resolved. And if common sense is not enough, ComEd's conduct reflects its knowledge of the importance of the Replaced Meter because it kept custody and control of the Replaced Meter for its own benefit so that it could test the meter. *See Kambylis*, 338 Ill. App. 3d at 794, 788 N.E.2d at 6 ("There can be little question that plaintiff and his family recognized that the preservation of the Escort was of crucial relevance to the case they intended to file against defendant because plaintiff's father went to the automotive pound to photograph the Escort prior to its destruction."); *Village Pontiac*, 223 Ill. App. 3d at 627, 585 N.E.2d at 1118 (noting that insurance company "unquestionably" knew of importance of the automobile to potential claims because it "allowed the car to be destroyed only after its experts had thoroughly examined the car and had issued their opinions on the cause of the fire."). ComEd also kept the Replaced Meter while it asserted the Back-Charge Claim, while the parties were attempting to resolve their dispute, after ComEd threatened to shut off Amcor's electricity, and while the Informal Complaint was pending.

Equally significant, ComEd's lawyers were aware of and involved in this dispute. *See* Paul Neilan's February 2, 2010 correspondence to Darryl Bradford, General Counsel to ComEd; and emails from Michael Pabian, Assistant General Counsel of Exelon Legal Services, dated February 17, 2010 and August 26, 2010 (Exhibits D, E and F to the Stipulation). ComEd was represented by counsel when the parties failed at efforts to settle this dispute, when ComEd made its shut-off threat, when Amcor filed its Informal Complaint, and when that Informal Complaint was closed without resolution. ComEd's counsel could have and should have directed ComEd personnel to retain the Replaced Meter; as the Stipulation makes clear, they did not do so. (Attachment A, Stipulation, ¶38). The obligation to preserve evidence is hardly a recent or obscure legal rule known only to a few specialists. Perhaps most damning of all, ComEd disposed of the Replaced Meter only one day after the Commission closed the Informal Complaint. One may very reasonably infer that someone following the progress of the dispute specifically directed that the Replaced Meter be thrown away.

Courts faced with conduct far less egregious than ComEd's have barred parties from presenting evidence related to destroyed property. For example, in *Kambylis*, 338 Ill. App. 3d at 792-93, 788 N.E.2d at 4-5, the plaintiff alleged that a defect in his automobile's airbag system contributed to his injuries in an accident; the Court barred evidence related to the automobile and entered summary judgment in favor of the defendant because the plaintiff had received a notice before the lawsuit began indicating that the City of Chicago (which had towed the vehicle) was about to destroy the car, but the plaintiff did nothing to prevent the destruction. In Marriage of Daebel, 404 Ill. App. 3d 473, 488, 935 N.E.2d 1131, 1143-44 (2nd Dist. 2010), the Court found that the trial court abused its discretion when it did not bar the petitioner's testimony; the petitioner had failed to show up for her deposition and then raised new defenses at trial. Significantly, the Court remanded with instructions to the trial court to prohibit the petitioner from testifying even if the trial court held a new hearing. In Village Pontiac, the plaintiff had allowed a car that allegedly caused a fire to be destroyed. The Court barred all evidence concerning the condition of the car, which ultimately led to entry of summary judgment against the plaintiff. 223 Ill. App. 3d at 626, 585 N.E.2d at 1117. The Court specifically rejected the plaintiff's argument that the sanction was overly broad because some evidence of the condition of the car remained, noting that the "Defendants would be able to observe only evidence gathered by the plaintiffs without reference to the object alleged to have caused the damage." 223 Ill. App. 3d at 628, 585 N.E.2d at 1119. In Graves, 172 Ill. App. 3d at 37-38, 526 N.E.2d at 680-81, the plaintiff's expert determined that a defective furnace had caused a fire, but the plaintiff then disposed of the furnace before filing suit; the Court barred the plaintiff from presenting any evidence, including expert testimony, regarding the furnace. In Black & Decker, 2003 WL 22139788, at 1, the plaintiff concluded that the defendant's toaster had caused a fire but failed to inform the defendant before allowing the fire scene to be renovated. The Court, applying Illinois state law, barred the plaintiff from introducing evidence regarding the cause of the fire: "because plaintiff failed to preserve evidence which may have been, or shed light upon, an alternative cause of the fire, plaintiff has deprived defendant of the ability to

establish its case." Id., at 2. In Lawrence, the Court followed Illinois state law in determining the appropriate sanction when the plaintiff had disassembled the motorcycle prior to filing suit. 1999 WL 637172, at 2-3. "Only a sanction barring evidence, direct or circumstantial, concerning the condition of the allegedly defective motorcycle will place the two parties on an equal footing." 1999 WL 637172, at 3. The Court entered the sanction acknowledging that it was the functional equivalent of dismissal. Id.

4. The Rationale Contained in the Proposed Order is Flawed.

The Proposed Order attempts to provide reasons for denying the Motion in Limine, but those reasons either contradict the record, ignore the record or find no basis in the record. For example:

The Commission Did Not Previously Consider The Motion In Limine. On page 7, footnote 1, the Proposed Order states: "The Commission notes that it considered the ALJ's ruling on the Motion in Limine when the issue was raised in Amcor's Brief on Exceptions and its Application for Rehearing as reflected in the third ordering paragraph of the Final Order." The Appellate Opinion, however, specifically rejected this argument. The Appellate Court noted that the Commission made precisely this argument (Appellate Opinion, p. 15); but it nevertheless unequivocally concluded that:

- "The only conclusion supported by the Commission's order is that the Commission adopted the ALJ's finding that Amcor forfeited review of the order on the motion *in limine*. (p.20)
- "The ALJ's recommendation that petitioner's claimed error was forfeit was erroneous, as the Commission has admitted to this court." (p. 21)
- "The Commission erroneously failed to address the merits of Amcor's motion *in limine*." (p. 22)

The Commission is bound by the Appellate Opinion, and its Order may not contest issues already decided by the Appellate Court.

Amcor had a Right to Test the Meter Itself. The Proposed Order states that: "As an initial matter, contrary to Amcor's assertions, it is not entirely clear that Amcor had a right to perform independent

or third party testing on the Replaced Meter….[T]here is also no provision in the Commission's rules that provides for this type of testing." "As ComEd noted, the only rule providing for customer requested meter testing is Section 410.190(d) which specifically provides for referee testing after a written application has been filed with the Commission." (pp. 7-8) These statements in the Proposed Order are simply wrong. Rule of Procedure 360(c) provides in pertinent part:

> [A]ny party may utilize written interrogatories to other parties, requests for discovery or **inspection of** documents or **property**, and **other discovery tools commonly utilized in civil actions** in the Circuit Courts of the State of Illinois in the manner contemplated by the Code of Civil Procedure and the Rules of the Supreme Court of Illinois.

(emphasis added). Illinois Supreme Court Rule 214 provides in pertinent part:

> Any party may by written request direct any other party **to produce for inspection**, copying reproduction photographing, **testing** or samples specified documents, **objects or tangible things**….

(emphasis added). The Commission's Order should not contain statements that are directly contrary to the Commission's Rules of Practice.

ComEd knew or should have known that future litigation was likely after the informal Complaint was closed. Amcor consistently and repeatedly disputed ComEd's attempt to assert the back-charge, and the parties exchanged multiple pieces of correspondence regarding the dispute. *See* Stipulation, ¶ 19 and Exhibits C – G attached thereto. Indeed, the Proposed Order acknowledges that Amcor objected to the testing evidence in February 2010. (p. 9) ComEd even involved its in-house lawyers in the dispute. When ComEd sought to disconnect Amcor's electricity, Amcor instituted an informal complaint. Stipulation, ¶¶ 4 and 20. The Commission closed the informal complaint expressly because it could not resolve the parties' dispute. Stipulation, ¶ 4. Further, ComEd did not even attempt to collect the disputed amount after the Commission closed the informal complaint—another sign that it anticipated litigation. Finally, multiple courts have found that a party's decision to test the evidence is itself evidence that it knew the evidence so tested was important for likely litigation. Kambylis, 338 Ill. App. 3d at 794, 788 N.E.2d at 6; Village Pontiac, 223 Ill. App. 3d at 627,

585 N.E.2d at 1118.[4]

But ComEd failed to provide any affirmative evidence from the in-house lawyers who were directly involved in the dispute that they did not believe litigation was likely.

Thus, at the time the Informal Complaint was closed the likelihood of continued litigation was gross, palpable and obvious. The Proposed Order's conclusion to the contrary is wholly without evidentiary support. Compounding this error, the Proposed Order purports to justify its conclusion with speculation that goes outside the record. For example, the Proposed Order states, without any support in the record, that "[a] fair amount of informal Complaints are filed against large public utilities like ComEd and many of these cases are closed after the informal Complaint process without progressing to a formal Complaint." Proposed Order, p. 8. To begin with, the Commission cannot base its conclusions on evidence that is not in the record. "In all proceedings, investigations or hearings conducted by the Commission, except in the disposition of matters which the Commission is authorized to entertain or dispose of on an ex parte basis, ***any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case***…." (220 ILCS 5/10-103)(emphasis added). Even if true, this statement is irrelevant and meaningless: this is not a case in which a residential customer, probably not represented by counsel, disputes a particular month's bill. This case involves a significant business enterprise disputing a substantial amount of money[5] where both sides were "lawyered-up." To conclude, as the Proposed Order does, that the Amcor/ComEd dispute, which involves more than sixty thousand dollars, was of a type that

4 ComEd's lawyers should have circulated a litigation hold. "Once an organization reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold.' This duty applies to both plaintiffs and defendants." 10 Ill. Prac., Civil Discovery, §23.30 (2nd Ed) (citing Zubalake v. UBS Warburg, LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Supplemental Appendix, pg. __. "Outside counsel and in-house counsel are responsible for coordinating and overseeing … preservation and production [of evidence]…." Id. See also, 10 Ill. Prac. Civil Discovery § 18.24 (providing checklists for "Counsel's Duty to Monitor Compliance" and "Counsel's Duty to Locate Relevant Information," which specifically include suspending routine document retention and destruction policies). Supplemental Appendix, pg. __.

5 Although ComEd's attempted back-charge involves just delivery charges, the resolution of this dispute impacts any claim against Amcor by its electricity supplier, MidAm, over an even larger amount of money.

the parties might simply drop because the Commission could not resolve it through its informal complaint process defies common sense.

The Proposed Order then wanders even further outside the record by characterizing ComEd's collection inactivity as "simply [an] oversight." Again, the Proposed Order reaches this result with absolutely no support in the record. ComEd has never provided evidence that its inactivity in collecting a $62,000 bill was a mere oversight, although it obviously would have such evidence in its possession if it existed. Failure to produce evidence in a party's possession creates an adverse inference. *See infra*.

Amcor was Unfairly Surprised by ComEd's Destruction of the Replaced Meter. The Proposed Order acknowledges that ComEd did not give Amcor notice that it was destroying the Replaced Meter. (p. 8) The Proposed Order nevertheless assigns the blame for ComEd's destruction of the Replaced Meter not to ComEd, the party who destroyed it, but to Amcor because Amcor did not demand to test the Meter during settlement negotiations. (p. 8) This conclusion has no basis in either fact, law or logic. The Proposed Order omits any citation to any decision, law or regulation that imposes a duty on a party to conduct actual discovery during pre-litigation settlement discussions. Likewise, the Proposed Order offers no authority imposing on that party's opponent the correlative duty to answer discovery during pre-litigation settlement discussions. The reason for these omissions is simple: there is no such authority and there are no such duties during this phase of a dispute. By blaming Amcor for destruction of the Replaced Meter, the Proposed Order not only sets itself in opposition to well-settled Illinois law, but purports to create a brand new class of discovery rights and duties that exist before a formal complaint has even been filed.

Further, ComEd has never claimed that Amcor's conduct somehow misled it into thinking that the Replaced Meter was not necessary. ComEd has not, and obviously cannot, claim that it thought the Replaced Meter—the central piece of evidence in the entire dispute—was insignificant to this dispute merely because Amcor didn't explicitly tell ComEd that the Replaced Meter was important. We can well

imagine the reaction if ComEd's in-house lawyers tried to make such an argument to their superiors. The Proposed Order tries to analogize Amcor to the defendants in Shimanovsky (p. 8), but the defendants in Shimanovsky waited **5-1/2 years after the case was filed** to raise the evidence destruction issue, on the eve of trial; the Shimanovsky plaintiffs would have been forced to change their litigation strategy for the entire case. 181 Ill. 2d at 125. In contrast, Amcor raised the issue promptly after filing the Complaint, and ComEd knew of Amcor's intention to file the Motion in Limine when the parties entered into the Stipulation. *See* Stipulation, p. 9, footnote 3, referencing the expected motion in limine.

Amcor was Prejudiced. The Proposed Order even admits that Amcor was prejudiced: "[I]t may be true that it [Amcor] suffered some degree of prejudice because it could not test the meter once it was discarded." (p. 8) The Proposed Order then dismisses the effect of that prejudice on Amcor by stating that ComEd gave Amcor access to the test results. (pp. 8-9) This is precisely the "solution" that multiple Illinois Courts have rejected as a matter of law: "As a matter of sound public policy, an expert should not be permitted intentionally or negligently to destroy such evidence and then substitute his or her own description of it." Village Pontiac, 223 Ill. App. 3d at 627-28, 585 N.E.2d at 1118-19. See also, Kambylis, 338 Ill. App. 3d at 798; 788 N.E.2d at 8 (holding that access to photographs and some parts of defective product were inadequate where "the most important evidence"—the product itself—is unavailable.); Lawrence, 1999 WL 637172 at 2 (videotape of disassembly of motorcycle was not a substitute for allowing a party to conduct its own inspection of the motorcycle). Village Pontiac, 223 Ill. App. 3d at 627-28, 585 N.E.2d at 1118-19; Kambylis, 338 Ill. App. 3d at 798, 788 N.E.2d at 8; Lawrence, 1999 WL 637172 at 2. Illinois law could not be more clear: Amcor had the right to conduct its own tests of the Replaced Meter.

The Proposed Order also tries to discount the prejudice to Amcor on grounds that it had other arguments to defeat ComEd's claim. (p. 9) But this rationale destroys itself because the Proposed Order

does not use these other arguments to decide this case in Amcor's favor. An argument that loses does nothing to remedy prejudice to the party advancing it.

Amcor was Diligent. The Proposed Order complains that Amcor was not diligent, but bases this conclusion solely on its new-found, unsupported idea that Amcor had a duty to conduct discovery during pre-litigation settlement discussions. As indicated above, no such duty exists.

There is Evidence of ComEd's Bad Faith. ComEd destroyed the meter the day after the Commission closed the informal complaint because the Commission could not resolve the parties' dispute. Stipulation, ¶¶ 20 and 37. Even the Proposed Order acknowledges that this incriminating timing "may appear suspicious." (p. 9) The Proposed Order nevertheless dismisses this fact, arguing that "There are no Commission rules that govern how long ComEd is required to retain meters." Id. Besides highlighting the incredible coincidence of the timing of destruction of the Replaced Meter (in other words, ComEd cannot blame the timing on the concurrent expiration of some mandated holding period), this statement ignores Illinois law requiring parties to retain evidence in the face of a dispute, as well as the fact that ComEd's lawyers were intimately involved in the dispute. ComEd had a legal obligation that its lawyers were, or should have been, aware of, and ComEd had a duty to take steps to preserve the key evidence relevant to the dispute. That the Commission may not have a rule dictating the periods for which removed meters must be kept is utterly irrelevant to a party's duty to preserve evidence when litigation is reasonably to be anticipated. The Proposed Order would whitewash ComEd's destruction of the Replaced Meter with the trite bromide that ComEd "is a large public utility." (Proposed Order, pgs. 9-10). But this fact cuts the other way—as the state's largest public utility, ComEd is a sophisticated litigant. ComEd should have been more, not less, aware of its duty to preserve evidence.

Indeed, ComEd has not proffered any evidence that it acted in good faith. In Shimanovsky, for example, the Court found that the plaintiffs had acted in good faith because they needed to conduct testing that would destroy evidence prior to filing the litigation—they needed the evidence to confirm that they

were not filing a frivolous case. 181 Ill.2d at 125.

Barring the Testing Evidence is the Only Possible Sanction. The Proposed Order also argues that barring the testing evidence is too harsh a sanction. (p. 10) To begin with, neither the Proposed Order nor ComEd has ever proposed an alternative, lesser sanction—rather, they propose that ComEd simply skate free, with no consequences whatsoever, despite its egregious conduct. Further, barring the evidence is not the equivalent of a default judgment, as the Proposed Order claims. Id. ComEd knew, prior to entering into the Stipulation, that its testing evidence was at risk; it could have tried to develop other evidence that the Replaced Meter under-reported usage, but it made the strategic decision not to do so. ComEd cannot now be heard to complain about the consequences of its own strategy. Finally, evidence of bad faith exists that is sufficient to justify even the harshest of sanctions. *See supra*.

C. Exception No. 3: The Basis for Decision Must be Confined to the Stipulation.

The Stipulation provides that it is "the entire evidentiary record in this proceeding." (Attachment A, Stipulation, page 1). Section 10-103 of the Public Utilities Act (220 ILCS 5/10-103) provides that all Commission decisions must be based exclusively on the record for decision in the case. Therefore, the Commission may consider only the statements of fact contained in the Stipulation in rendering its decision in this case.

Despite its agreement in the Stipulation, ComEd repeatedly attempted to introduce evidence that was outside the scope of the Stipulation in these proceedings, requiring Amcor to file multiple Motions to Strike. For example, in connection with the Motion in Limine, ComEd filed three separate affidavits from Mr. Thomas Rumsey.6 The vast majority of the assertions in these affidavits had nothing to do with the

6 *See* Affidavit of T. Rumsey, attached to ComEd Response to Amcor's Motion in Limine filed February 27, 2012; Affidavit of T. Rumsey, attached to ComEd Motion to Strike Portions of Amcor's Pleadings and Legal Argument on its Motion in Limine filed May 11, 2012; Affidavit of T. Rumsey, attached to ComEd's Reply in Support of Motion to Strike Portions of Amcor's Pleadings and Legal Argument on its Motion in Limine, including 148 pages of attachments, filed June 4, 2012. This same affidavit of T. Rumsey and 148 pages of attachments were also attached to ComEd's Reply in Support of its Motion for Reconsideration of ALJ Ruling Denying a Hearing on the Motion in Limine, filed on June 4, 2012.

Motion in Limine. Rather, the affidavits were a transparent effort by ComEd to evade the Stipulation, which took the parties nearly six months to negotiate. The ALJ granted Amcor's motions to strike all of these affidavits in Orders dated April 27, 2012 and July 31, 2012.

ComEd then made multiple factual allegations in its briefing on the Motion and Cross-Motion for Judgment. The ALJ denied Amcor's motions to strike these allegations in her Order dated February 21, 2013, stating that Amcor did not suffer prejudice from these assertions. Not only was this not a proper basis to deny Amcor's motion to strike, the ALJ's ruling violated Section 10-103 of the PUA, and the ALJ should have granted Amcor's motion.

ComEd attempted to introduce additional evidence in its Response to the ALJ's Data Request Made on Record on March 12, 2013, filed April 1, 2013, claiming that the ALJ had asked for this information at oral argument, and its Motion to Admit Evidence before Closing the Record filed on April 8, 2013. The ALJ refused to consider this evidence and granted Amcor's motion to strike in her order dated June 21, 2013.

The Commission can simply include the language in Amcor's Exceptions in the "Commission Analysis and Conclusions" section providing that the evidentiary record is restricted to the Stipulation, and delete the portions of the "Commission Analysis and Conclusions" section of the Proposed Order, as provided in Amcor's Exceptions.

D. Exception No. 4: The Commission Should Find That ComEd Cannot Back-Bill Amcor

The Commission should, as an alternative grounds for granting the relief sought in the Formal Complaint, find that Regulation 410.200(h)(1) prohibits ComEd from back-billing Amcor because ComEd did not conduct the tests required by Part 410 of its Regulations.

1. If the Commission Grants Amcor's Motion in Limine, ComEd Has No Evidence to Support Its Position

If the Commission grants Amcor's Motion in Limine, ComEd will have no evidence that the

Replaced Meter under-billed, or that the Replaced Meter was programmed with the wrong scaling factor. ComEd also will be unable to provide evidence that its calculation of the amount of under-billing was correct.

The Stipulation expressly contemplates Amcor's filing of the Motion in Limine. (Attachment A, Stipulation, pg. 9, fn. 3). But granting the Motion in Limine is in no way equivalent to a default judgment because ComEd made the conscious, strategic decision to rest its entire case on its testing results when it knew full well that there was a substantial risk that those results would not be admitted into evidence. Despite that risk, ComEd never tried to develop any other evidence to support its case.

2. ComEd Cannot Back-Bill Amcor Even If the Replaced Meter Under-Billed.

ComEd did not conduct any test of the Replaced Meter after installation, as required by Regulation 410.155. Further, the pre-installation testing that ComEd performed was inadequate under Regulation 410.160. Because ComEd failed to test the Replaced Meter in compliance with the Commission's regulations, Regulation 410.200(h)(1) bars ComEd from adjusting Amcor's bill.

a. Regulation 410.155

Regulation 410.155 provides as follows:

Installation Inspections.

> **Within 90 days after installation or exchange** of any meter with associated instrument transformers and/or phase-shifting transformers, a post-installation inspection shall be made **under load** to determine if the meter is accurately measuring customer energy consumption. At a new or re-wired metering location, where the installation includes potential transformers, the inspection shall be performed by someone other than the original installer.

(Emphasis added.) Paragraph 21 of the Stipulation states that ComEd tested the Replaced Meter on July 19, 2005, and installed the Replaced Meter on August 1, 2005. It also states that ComEd did not conduct any additional testing of the Replaced Meter until after ComEd removed it from service in April 2009, almost four years later. It is therefore undisputed that ComEd did not test the Replaced Meter under load within the 90-day period following its installation.

b. Regulation 410.160

Regulation 410.160 provides in pertinent part as follows:

> Initial Tests
>
> Initial tests are tests made before installation, regardless of whether the meter and associated devices have previously been in service. Each meter and associated devices (unless including in the sample testing plan in Section 410.180) shall be inspected and tested in the meter shop of the entity or other location that meets the requirements of this Part before being placed in service, and the accuracy of the meter shall be within the tolerances permitted by this Part….

ComEd did test the Replaced Meter prior to installation, but it tested only part of it. In particular, ComEd tested only whether the Replaced Meter sent a test pulse for every 1.2 watt-hours of power flowing through the meter. Stipulation ¶34. ComEd, however, did not test whether the "Meter Engine" was sending the proper number of pulses to the billing memory, or whether the Replaced Meter was reporting the correct amount of the customer's electricity usage when read. Stipulation ¶35.

If a meter wrongly reports customer usage information to the meter reader, it is not accurate. ComEd never tested the Replaced Meter to see if it was reporting accurate information to the billing memory, and therefore it failed to test the Replaced Meter to determine that it was accurate. The purpose of a meter is to accurately report the customer's energy consumption for billing purposes, not to generate test pulses. ComEd offered no evidence to explain why it failed to test whether the Replaced Meter did what it was supposed to do—report accurate usage information on which to bill the customer. ComEd's half-hearted testing of part of the Replaced Meter does not meet the requirement of Regulation 410.160 that a meter be tested for accuracy.

c. Regulation 410.200(h)(1)

Regulation 410.200(h)(1) provides as follows:

> h) Billing adjustments:
>
> 1) For electric utilities. Any correction to metering data for over-registration shall be accompanied by an adjustment to customer billing by any electric utility that rendered service that is affected during the period of adjustment. Corrections made to metering data

> for under-registration may be accompanied by an adjustment to a customer's billing. However, if an electric utility is providing metering service, **in no case shall an adjustment to a customer's billing be made for under-registration if all testing and accuracy requirements of this Part have not been met.**

(Emphasis added.) The plain language of this regulation prohibits ComEd from back-billing Amcor. All testing requirements of Part 410 have not been met because (a) ComEd did not conduct any post-installation testing at all, and, separately, because (b) ComEd's pre-installation testing was inadequate to determine if the Replaced Meter was accurately reporting the customer's energy consumption. In other words, because ComEd failed to comply with either the pre-installation or the post-installation testing requirements, it cannot back bill Amcor. Further, the only justification that ComEd has for the back-bill is its assertion that the Replaced Meter billed only one-third of Amcor's actual usage, so (if ComEd is to be believed) the Replaced Meter under-registered Amcor's usage. Indeed, ComEd's admits this in its pre-litigation correspondence (only changing its story after the Formal Complaint was filed). On December 8, 2009, ComEd sent Amcor a letter, a copy of which is attached to the Stipulation as Exhibit B, asserting that "the meter **did not register** all of the usage flowing and underbilled Amcor's Account by almost one-third." (*Id*. at ¶ 17) (emphasis added). Similarly, Michael Pabian, ComEd's Assistant General Counsel, noted in his email dated February 17, 2010 (Attachment A, Stipulation, Ex. E) that "the meter was undercounting the pulses" and was "under-register[ing] the usage flowing through the meter."

3. The Clear Language of Regulation 410.200(h)(1) Bars ComEd from Back-Billing Amcor.

It should come as no surprise that, under basic Illinois law, the words of a statute or regulation must be given "their plain and ordinary meaning." *Illinois Insurance Guaranty Fund v. Virginia Surety Company, Inc.*, 2012 WL 4858995, at 6 (1st Dist. 2012). The plain language of Regulation 410.200(h)(1) states that, if there is under-registration and ComEd failed to conduct the tests required by Part 410, then ComEd cannot adjust Amcor's bill. Why the meter under-registered is irrelevant to Regulation 410.200(h)(1). This provision does not use the term "meter error" or "average error," even though the

prior Commission Order argues incorrectly for a counter-intuitive definition of those terms; Regulation 410.200(h)(1) bars ComEd from adjusting Amcor's bill.

The prior Commission Order also attempts to give the term "under-registration" a counter-intuitive meaning that is far from the plain meaning of the term. Without citing any statute, regulation or even a dictionary, the prior Commission Order states that a meter that under-reports the amount of electricity usage is not under-registering, and that the amount of usage that a meter measures is not the same as the amount of usage that a meter reports. Not only is this strained interpretation inconsistent with the plain meaning of the terms, it contradicts ComEd's own understanding of the meaning of these terms, until it changed its position when the litigation started. ComEd's initial demand letter explicitly stated that the meter "did not register all of the usage flowing" (Exhibit B to the Stipulation, p. 2); indeed, even ComEd's Assistant General Counsel stated that "the meter was undercounting the pulses" and was "under-register[ing] the usage flowing through the meter." (Email of M. Pabian of February 17, 2010, Exhibit E to the Stipulation). ComEd's admissions are powerful evidence of what the plain and ordinary meaning of "under-registration" is; the Proposed Order's failure to even mention this correspondence in its analysis is improper.

4. The Prior Commission Order Ignores the Clear Purpose of Regulations 410.155, 410.160 and 410.200(h)(1).

The prior Commission Order justifies its conclusion that Section 410.200(h)(1) does not mean what its words say by arguing that the regulation must be interpreted "in context." Yet the prior Commission Order's analysis ignores the most fundamental aspect of "context": the purpose of these Regulations. It is both common sense and Illinois law that the purpose of a statute or regulation is an important factor in its interpretation. *Illinois Insurance Guaranty Fund*, 2012 WL 4858995, at 6 (the "reason and necessity" of a statute must be considered in interpreting it). With regard to Regulation 410.155, it is undisputed that ComEd did not perform any post-installation test within the 90 day period. For the pre-testing requirement of Regulation 410.160, the question is: why does the Commission require accuracy testing? Does this requirement exist because the Commission wants to make sure meters send accurate test pulses, or because

the Commission wants meters to report accurate information for customer billing? The self-evident answer is that meters exist not to generate test pulses, but to generate accurate information for billing purposes.

Regulation 410.200(h)(1) provides that ComEd cannot adjust a customer's bill for under-registration if it has not conducted the testing required by Part 410. There are only two possible purposes of a Commission regulation providing that, even if a customer receives unbilled electricity, ComEd is not allowed to adjust the bill. The first is that the Commission wants to protect customers from surprise adjustments. The second is that the Commission wants to create an economic incentive for the utility to comply with its testing regulations. These purposes are not mutually exclusive. The prior Commission Order's analysis of the "context" errs profoundly because it fails to consider what the regulation is trying to accomplish. Indeed, the prior Commission Order does more to thwart than promote the purposes of the regulation. In contrast, interpreting Regulation 410.200(h)(1) according to the plain and ordinary meaning of its terms leads to a result consistent with the obvious purpose of the regulation — to prevent ComEd from back-billing if it breached its duty to test the Replaced Meter as required by the Commission's regulations.

5. The Context of Regulation 410.200(h)(1) Supports a Prohibition of ComEd's Back-Bill of Amcor's Account.

The Prior Commission Order refers to Regulation 410.150, which defines "Meter Accuracy Requirements," and suggests that the tests to which Section 410.200(h)(1) refers (the pre-conditions for ComEd to be able to adjust Amcor's bill) are the tests described in Regulation 410.150, and that those tests measure only test pulses. There are at least two problems with the Prior Commission Order 's analysis. The first is that ComEd simply did not conduct the test required by Regulation 410.155 (the post-installation test). While the Prior Commission Order's assertions might be relevant to whether ComEd's pre-installation tests complied with Regulation 410.160, they do not excuse ComEd's complete failure to conduct any type of test at all within 90 days after installation of the Replaced Meter. Regulation 410.155 is particularly instructive here since it requires a post-installation test **under load** expressly to determine whether the

meter is "accurately measuring customer consumption." The Prior Commission Order errs in providing that that testing requirement may be satisfied by measuring test pulses, even though measuring a test pulse does not determine that the meter is accurately reporting customer consumption under load. If it did, there would be no way that a meter that reports only one third of a customer's usage could pass such a test.

The second problem with the Prior Commission Order's analysis is that Regulation 410.150 provides no support whatsoever for the Commission's conclusion that meter tests do not need to check the fundamental function of the meter: to measure the customer's electricity usage. Regulation 410.150 explains how to calculate accuracy given test results under the various conditions under which tests must be conducted; and it requires meters to be accurate within 1%, 2% and 3%, depending on the specific test. Section 410.150 says absolutely nothing about whether a utility need look just at test pulses, which reflect only the function of the "meter engine," rather than the function of the meter as a whole, which is to accurately measure the customer's usage.

Nothing in Regulation 410.150 excuses ComEd's complete failure to conduct a post-installation test, particularly when Section 410.200(h)(1) bars ComEd from adjusting Amcor's bill if ComEd failed to conduct either a pre- or a post-installation inspection. Further, nothing in Regulation 410.150 explains why the Commission should ignore the plain meaning of "accuracy" or find that a pre-installation test that does not measure the accuracy of the information that a meter reports for billing is nevertheless an accuracy test (to the extent that ComEd's failure to comply with Regulation 410.160 even matters given its failure to comply with Regulation 410.155). Nothing in Regulation 410.150 supports the conclusion that looking only at test pulses somehow measures a customer's actual energy consumption. Nothing in Regulation 410.150 explains why the Commission should ignore the plain and ordinary meaning of "meter error" and find that a meter that allegedly reports only one-third of electricity usage nonetheless does not have an error. Finally, nothing in Regulation 410.150 explains why the Commission should ignore the plain and ordinary meaning of the term "under-register," or why the Commission should ignore ComEd's admissions that the Replaced

Meter under-registered.

The Commission's prior order also tries to rationalize ComEd's failure to test the full function of the meter on the ground that different scaling factors would not have altered the amount of current that flowed through the Replaced Meter; that is, the test pulse would still measure 1.2 watt-hours for every revolution of the virtual disk regardless of the scaling factor. (Order at pg. 22). From this, the Commission concludes that the Replaced Meter was "accurate" and did not under-register usage. (Order, pgs. 22-23). This rationalization of ComEd's non-compliance with the Commission's own required meter testing regime is irrelevant for a rather basic reason. The answer to the question of whether the same amount of current flowed through the meter regardless of the scaling factor is "yes," and it will always be "yes," not because of any supposed independence from the scaling factor, but rather because of Kirchoff's Current Law, a fundamental law of physics that states that the current flowing into any given circuit is always equal to the current flowing out of that circuit.7 Whether a meter is accurate, inaccurate, or not functioning at all, the current flowing into it will equal the current flowing out of it.

6. The Proposed Order Ignores the Fact That ComEd Violated the Commission's Regulations.

Paragraph 21 of the Stipulation makes it clear that ComEd did not bother to conduct any type of post-installation inspection of the Replaced Meter under load, or within the required 90-day period. Further, ComEd's pre-installation testing was woefully inadequate—the purpose of a meter, obviously, is to report usage, but ComEd never bothered to test what information the Replaced Meter reported; failing to test what the Replaced Meter reported cannot constitute an accuracy test.

The "Commission Analysis and Conclusions" section of the Prior Commission Order does not even mention that it is virtually undisputed that ComEd violated Regulation 410.155 (for post-installation inspection), and it contains no discussion of whether ComEd's testing of only part of the Replaced Meter

7 Given the Commission's focus on the Replaced Meter, we may justifiably apply Kirchoff's Current Law at the point of the Replaced Meter in an alternating current circuit.

means that ComEd also violated Regulation 410.160. Given that the ALJ's entire analysis focused on Regulation 410.200(h)(1), the Proposed Order ought to at least reflect a finding regarding one of the regulation's explicit elements.

7. Deficiencies in ComEd's Responses.

In its prior pleadings related to the prior Commission Order, ComEd made several arguments that the Prior Commission Order wisely ignores because of their utter lack of merit. These arguments include:

a. Regulation 410.155 and "Inspection" v. "Test."

ComEd never tested the Replaced Meter within the 90-day period after its installation, in violation of Regulation 410.155. (Attachment A, Stipulation, ¶21). ComEd's main defense of its failure to conduct any required post-installation testing is that Regulation 410.155 requires a post-installation "inspection," rather than a "test." This attempt at verbal acrobatics fails for several reasons. To begin with, there is no meaningful distinction between a "test" of the meter and an "inspection" of the meter. Merriam-Webster, for instance, defines an "inspection" as "a check or testing of an individual against established standards." *See* Attachment B. Indeed, ComEd provides no support for this distinction.

Further, if ComEd had conducted a post-installation inspection, it would have presented evidence of it. This is not just common sense, it is codified by Illinois law: a party's failure to produce evidence within its control leads to an evidentiary presumption against it that no such evidence exists. *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3 491, 840 N.E.2d 767, 779 (2nd Dist. 2005); Illinois Pattern Jury Instructions – Civil, 5.01 (www.state.il.us/court/CircuitCourt//CivilJuryInstructions/5.00.pdf).

b. Regulation 410.160 and Inadequate Pre-Installation Testing.

ComEd argues that its test of the "Meter Engine" portion of the Replaced Meter, by analyzing test pulses, means that it tested the entire Replaced Meter for accuracy; ComEd therefore argues that the Replaced Meter was accurate. However, electricity meters obviously exist to report a customer's electricity usage; if one never tests whether the meter is reporting electricity usage accurately, then one

never really tested to determine if the meter was accurate. Accepting ComEd's argument would mean that a meter that reports only one-third of a customer's electricity usage is nonetheless accurate, an absurd result. ComEd's argument fails the "Five-Year Old Test": a five-year old child could not say it without giggling. Not surprisingly, ComEd's litigation position also contradicts its own position before the distorting lens of litigation came into play. For example, its demand letter acknowledges that the Replaced Meter "was faulty." Exhibit B to the Stipulation, p. 1.

c. Section 280.100 Does Not Render Section 410.200(h)(1) a Nullity.

ComEd appears to argue that 280.100 (billing for "Unbilled Service") allows it to back-bill Amcor even if Regulation 410.200(h)(1) forbids it. However, this position violates fundamental rules of statutory construction. To begin with, it would render 410.200(h)(1) a nullity, since the prohibition against adjusting a customer's bill would never apply in any circumstance. Beyond contravening the obvious purpose of the regulation, "Statues are to be construed to give full effect to each word, clause and sentence, so that no word, clause, or sentence is surplusage or void. [citations omitted] Courts avoid interpretations which would render part of a statute meaningless or void [citation omitted], and the presence of surplusage will not be presumed. [citation omitted]" *Chestnut Corp. v. Pestine, Brinati, Gamer, Ltd.*, 281 Ill. App. 3d 719, 724 (1st Dist. 1996). *See also, Aurora Manor, Inc. v. Department of Public Health*, 2012 WL 4463237, at 3 (Ill. App., 1st Dist. 2012). Further, the more specific statute (Regulation 410.200(h)(1) controls over the more general statute. *Knolls Condominium Association v. Harms*, 202 Ill.2d 450, 459 (2002).

8. A Software Problem Did Not Cause the Under-Billing; The Replaced Meter Gave the Wrong Information When Read.

The Prior Commission Order implies that the Replaced Meter did not report inaccurate information but, instead, a "mismatch" occurred with ComEd's billing software. Proposed Order, pp. 22-23. There is no evidence in the record, and ComEd does not even contend, that ComEd's billing software malfunctioned. There is no dispute (or, at least, Amcor cannot dispute, if the testing evidence is admitted) that the Replaced Meter provided the wrong information when the Replaced Meter was read. There is no evidence of a "billing error" independent of a "meter error"; even ComEd asserts that the Replaced Meter gave the wrong billing information. There was no intervening cause (such as the meter reader, the billing software, or some computer that generates bills) that malfunctioned; the Replaced Meter gave out the wrong information.

9. ComEd's Presentation (Stipulation Exhibit H) Did Not "Supersede" Its December 8, 2009 Letter.

Pages 19-20 of the Prior Commission Order, summarizing ComEd's position, contains a section with this title. ComEd never made this argument, and the text of the section does not support its title. If the argument had been made, however, it would have been flawed and ineffectual for at least three reasons. First, ComEd's admissions in its pre-litigation correspondence (Exhibit B to the Stipulation)—and the admissions of its lawyers in pre-litigation correspondence (Exhibit E to the Stipulation)—that the Replaced Meter under-registered Amcor's meter usage are not just evidence, they are the type of evidence that is deemed particularly meaningful. Admissions against interest are an exception to the hearsay rule precisely because they are deemed to be especially reliable. *People v. Tenney*, 205 Ill. 2d 411, 433 (2002); see generally M. Graham, *Cleary & Graham's Handbook of Illinois Evidence* § 804.7 (7th ed. 1999); 2 J. Strong, *McCormick on Evidence* §§ 316 through 320 (4th ed. 1992). A party's presentation made after litigation has commenced—and made specifically to assert its position in the litigation—has no such indications of reliability. Second, the Stipulation specifically states that Exhibit H is not agreed, and that

the parties are not moving to have Exhibit H entered into evidence. (Attachment A, Stipulation, ¶22, fn. 2). Exhibit H is a demonstrative exhibit, and Illinois law is clear that demonstrative exhibits are not to be considered evidence. *Griffin v. Subram*, 238 Ill. App. 3d 712, 718 (1st Dist. 1993). Third, Exhibit H does not contradict Amcor's position. Exhibit H merely demonstrates that the test pulse determines the accuracy of only one part of the meter—the "Meter Engine"—and it does not measure the accuracy of the rest of the meter—the Microcontroller, the EEPROM, the billing memory, or the information that is reported when the meter is read.

E. Exception No. 5: The Commission's Regulations Show That The Proposed Order's Acceptance of ComEd's Interpretation of Section 410.200(h)(1) is Incorrect.

In concluding that Section 410.200(h)(1) does not apply to this dispute, the Prior Commission Order adopts ComEd's argument that there was no under-registration because the Replaced Meter sent out the correct test pulse of 1.2 kilowatt-hours per revolution of the virtual disk, regardless of what the scaling factor is, and that the billing information reported by the meter when read is irrelevant. (Prior Commission Order, pages 21-25.) Applying ComEd's logic to another scenario shows that ComEd's argument is inconsistent with other Commission Regulations.

For example, suppose that instead of being programmed with a scaling factor that caused Amcor to be billed for only one third of its actual consumption, the Replaced Meter was programmed with a scaling factor that caused Amcor to be billed for three times its actual consumption. Suppose also that Amcor requested a Commission-refereed meter test under Regulation 410.190(d). ComEd's position is that there can be no under-registration if the test pulse shows the correct 1.2 kilowatt-hours per revolution. By the same token, there can be no over-registration in our hypothetical because the test pulse is equally correct, even though Amcor was billed for three times its actual usage. Under Regulation 410.190(d), Amcor would not only lose the refereed meter test, it would not even get back its $20 fee to the Commission (Regulation 410.190(d)(1)) for that test, even though the parties agree that ComEd billed Amcor for three times the

amount of Amcor's actual energy consumption. Such a result would be absurd.

Accordingly, the Commission should find that Section 410.200(h)(1) does apply to this case.

F. Exception No. 6: The Findings and Ordering Paragraph Should Be Modified To Be Consistent With the Proposed Changes to the Commission Analysis and Conclusions.

Amcor's Exceptions modify the Findings and Ordering paragraph to be consistent with its Exceptions to the previous parts of the Proposed Order.

III. CONCLUSION

ComEd's conduct in throwing away the Replaced Meter the day after the Commission closed the Informal Complaint, and before Amcor could file a Formal Complaint, was egregious. It also prejudiced Amcor because it was never able to test the Replaced Meter. For these reasons, ComEd's evidence that the Replaced Meter under-billed—its test results—should be barred from this proceeding. As a result, Amcor is entitled to judgment on its Formal Complaint because ComEd chose not to provide any other evidence that the Replaced Meter under-billed.

In addition, ComEd should be barred from adjusting Amcor's bill because it failed to conduct required testing. Both literally and figuratively, the meter is the point of contact between the utility and the customer. There are many different manufacturers and models of revenue grade meters and transformers that utilities can purchase, and the Commission's meter accuracy regulations cannot, and are not intended to, be a user's manual for each of them. Rather, the Commission's meter accuracy requirements must be construed in light of their purpose, namely, to ensure that customers are billed for their actual usage as accurately as possible. There is no dispute that ComEd flouted Commission Regulation 410.155 by failing to conduct any post-installation test of the Replaced Meter, and its pre-installation testing was inadequate to determine whether the meter would accurately report Amcor's actual energy consumption. Accordingly, the Commission should hold that 400.200(h)(1) applies in this case, and it should render judgment in favor of Amcor as set forth above.

For the foregoing reasons, the Commission should modify the Proposed Order as provided in Amcor's Exceptions, filed concurrently herewith.

IV. ORAL ARGUMENT REQUESTED

Pursuant to Commission Rule 200.850, Amcor respectfully requests oral argument on the Proposed Order and Amcor's Exceptions.

Respectfully submitted,

AMCOR FLEXIBLES, INC.

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Attachments:

Attachment A – Stipulation of Facts and Undisputed Testimony

Attachment B – Merriam-Webster Online Dictionary, Definition of "Inspection"